



Office of the Attorney General

State of Texas

September 16, 1992

DAN MORALES

ATTORNEY GENERAL

Mr. Edward H. Perry
Assistant City Attorney
City of Dallas
Office of the City Attorney
City Hall
Dallas, Texas 75201

OR92-514

Dear Mr. Perry:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 16230.

The Manager of the Dallas/Fort Worth Railtran System (Railtran) received a request for certain information about Railtran. You seek to withhold some of the requested information based on sections 3(a)(4), 3(a)(5), 3(a)(7), and 3(a)(11) of the Open Records Act. Because of the large volume of the requested information, you sent representative samples of the information for which you assert these exceptions.

The office of the city attorney for the City of Fort Worth also has responded to this open records request. Mr. David L. Yett, Assistant City Attorney for the City of Fort Worth, has raised sections 3(a)(1), 3(a)(7), and 3(a)(11) in regard to several requested items.

We begin by disposing of your claim under section 3(a)(4). You inform us that Railtran is in the process of negotiating agreements with two freight railroads who utilize the Railtran corridor. You assert you may withhold the information pursuant to section 3(a)(4) because disclosure of the details of Railtran's negotiating strategies would give advantage to the two competing freight railroads.

Section 3(a)(4) excepts from required disclosure "information which, if released, would give advantage to competitors or bidders." Section 3(a)(4) applies

primarily to competition for government contracts and has been construed to protect the sealed bid process. *See* Open Records Decision Nos. 541 (1990); 463 (1987). In this case, the two freight railroads are not competing for a government contract; thus, this is not a competitive bidding situation. Section 3(a)(4) is therefore inapplicable.

Section 3(a)(7) of the Open Records Act protects communications within the attorney-client privilege. Open Records Decision No. 574 (1990). This protection applies to factual information or requests for legal advice communicated by the client to the attorney, and to the legal advice, opinion, and recommendation the attorney made to the client or to associated attorneys on the case. *See id.*; *see also* Open Records Decision No. 589 (1991) (section 3(a)(7) applies only to portions of attorney fee bills which reveal client confidences or attorney advice). The privilege also applies to correspondence between an attorney and one employed by a lawyer to assist in the rendition of professional legal services and correspondence between a lawyer and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* Tex. Rules of Civil Evidence, Rules 503(a)(4), (b)(2), (b)(3). Following these principles, we agree that some of the information you and Mr. Yett submitted is protected from required public disclosure pursuant to section 3(a)(7). We have marked the documents accordingly.

We will consider the application of section 3(a)(11) to drafts of agreements and proposed legislation, correspondence between Railtran and Dallas Area Rapid Transit (DART) representatives, and correspondence between representatives of Railtran and the Fort Worth Transit Authority ("the T"). Section 3(a)(11) excepts inter-agency and intra-agency memoranda and letters to the extent that they contain advice, opinion, or recommendation intended for use in the governmental body's policy making and deliberative process. Open Records Decision No. 574. Facts and written observations of facts and events, when such information is separable from advice, opinion, or recommendation, may not be withheld under section 3(a)(11). *Id.* The exception can apply to information created by outside consultants acting on the behalf of the agency in an official capacity. Open Records Decision No. 462 (1987).

You may withhold the drafts of the agreements, with accompanying correspondence. However, you must release the drafts of proposed legislation since those have been disclosed to the public. *See* Open Records Decision No. 559 (1990). The bulk of the correspondence between representatives of Railtran and DART and representatives of Railtran and the T qualify for exception under section

3(a)(11). We have marked the portions of the documents which you may withhold pursuant to section 3(a)(11).

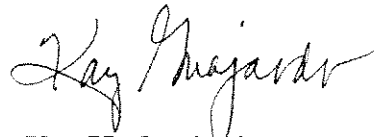
Finally, we agree with Mr. Yett that section 3(a)(5) of the Open Records Act excepts portions of the letter about the acquisition of a site for the commuter rail maintenance facility. Section 3(a)(5) permits a governmental body to withhold

information pertaining to the location of real or personal property for public purposes prior to public announcement of the project, and information pertaining to appraisals or purchase price of real or personal property for public purposes prior to the formal award of contracts therefor.

The purpose of this exception is to protect a governmental body's planning and negotiating position with respect to particular transactions. *See* Open Records Decision No. 357 (1982). We conclude that section 3(a)(5) is applicable to information in the letter about the proposed location of the commuter rail maintenance facility. *See* Open Records Decision No. 265 (1981). Please note that the protection of this exception expires upon the acquisition of the property. *See* Open Records Decision No. 222 (1979).

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR92-514.

Yours very truly,



Kay H. Guajardo
Assistant Attorney General
Opinion Committee

KHG/lmm

Ref.: ID# 16230
ID# 16267
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Enclosures: Submitted documents

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(w/o enclosures)